No. 210.

APR 12 1898

JAMES H. MCKENNEY,

Sup. Ct. of Sperry for Def.

Supreme Court of the United States.

OCTOBER TERM, 1897.

Term, No. 210. Case, No. 10,349.

Filed April 12, 1898.

S. H. WILLIAMS,
Treasurer of the Town of Glastonbury, Hartford County, State of Connecticut,
PLAINTIFF IN ERROR,

vs.

ARTHUR F. EGGLESTON,
Attorney for the State of Connecticut,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CONNECTICUT.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

By SPERRY, MCLEAN & BRAINARD, *Counsel.*

APRIL, 1898.

HARTFORD, CONN.:
PRESS OF THE CASE, LOCKWOOD & BRAINARD COMPANY.
1898.

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S. H. WILLIAMS,

TREASURER OF THE TOWN OF GLASTONBURY, HARTFORD COUNTY, STATE OF CONNECTICUT,

PLAINTIFF IN ERROR,

vs.

ARTHUR F. EGGLESTON,

ATTORNEY FOR THE STATE OF CONNECTICUT,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CONNECTICUT.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

The brief of the defendant in error, heretofore submitted to this Court in support of the motion to dismiss or affirm under rule six filed in April, 1897, discusses at length all the points raised in the Record. With that brief is printed the brief of defendant in error, submitted to the Supreme Court of Errors of Connecticut, and it seems to us that the authorities cited in the briefs referred to clearly hold that there is no legal force or merit to the claim of plaintiff in error that

a question under the Constitution of the United States is in any way involved in the proceedings at bar.

In this supplemental brief we shall not attempt to do more than call the attention of this Honorable Court to our briefs in full, submitted in April, 1897, and comment very briefly upon some of the claims found in the brief for the plaintiff in error, filed in April, 1897, and which to us seem to be unwarranted by the record. For the purpose of this argument we hereby submit our brief heretofore filed upon our motion to dismiss or affirm.

The claims of the plaintiff in error may be safely reduced to two propositions, as follows:

First.

The State Court erred in not holding that the two Acts of May 24, 1895 (Ex. 8 R., p. 57), and June 28, 1895 (Ex. B. R., p. 52), and the orders of the Commissioners passed thereunder, impaired the obligations of an alleged contract in violation of the 10th Section of Article 1 of the Constitution of the United States.

Second.

The State Court erred in not holding that said acts or orders referred to deprived the taxpayers of Glastonbury of their property without due process of law and denied to said town and taxpayers the equal protection of the laws in violation of Sec. 1, of Art. 14, of the Constitution of the United States.

I.

THE CONTRACT.

We contend that no question involving the validity of the alleged contract with The Berlin Iron Bridge Company, or its subsequent impairment by the legislation referred to, is properly before this Court for determination.

The contract calls for the construction of a steel bridge across the Connecticut River at Hartford.

The order of the commissioners which gave rise to this action requires the treasurer of the town of Glastonbury to pay $15 toward the ordinary repair of the highway east of the bridge, and in no way connected with the bridge.

In the finding of facts (R., p. 49, Sec. 4) it is conceded by the respondent treasurer that the $15 which the treasurer refused to pay was a part of a sum of money expended east of said river, and wholly in connection with the causeway.

We contend, therefore, that, in all events, the acts of 1895 must be left to operate, in so far as they make provision for the maintenance and repair of the highway wholly separate from the bridge.

The Acts describe the highway in question as the bridge across the Connecticut River at Hartford, together with the causeway; this causeway is an elevated roadway about a mile in length, extending from the bridge to Main Street of East Hartford.

The Acts in question make it the duty of the five towns benefited to maintain and repair both the bridge and the causeway. If there was an existing contract binding the State to pay for a new bridge, it does not follow that the General Assembly was impotent to place the burden of maintaining the causeway upon the five towns.

In paragraph 24 of the defendant's return (R., p. 21) the defendant says:

> "The greater part of the expense incurred by said commissioners, the relators in the present application, and for the payment of a proportion of which said demand and requisition was made on said town of Glastonbury, and on this defendant as treasurer of said town, September 14, 1895, was

> incurred by said commissioners in connection with and in preparation for the construction of a *permanent bridge* across said river at the point described in said contract . . . . with the said The Berlin Iron Bridge Company."

But the plaintiff in error not only did not try to establish the truth of this very necessary part of its defense, but, as we have heretofore shown, admitted in the finding of facts that the money which this writ seeks to recover was expended "*wholly in connection with the causeway.*"

In the hearing before the Connecticut Court the relators were willing that that Court should pass upon the statute in question as affecting the contract with The Berlin Iron Bridge Company, but we do not believe that this Honorable Court will decide questions not raised in the Record.

If this Court, however, should proceed to a consideration of the assignment of errors in relation to the alleged contract with The Berlin Iron Bridge Company, we contend:

A.

That the contract was never a valid contract.

We discussed this point at length in our brief heretofore submitted to this Court and the State Court; but, as the State Court decided the case upon other grounds, acknowledging the existence of the alleged contract for the purposes of the argument, we may safely confine our argument to a review of the judgment of the State Court.

B.

It is admitted in the Record, page 49, paragraph 7, that the alleged contract, valid or invalid, was surrendered to the State by the party in whose interest it was written as fully paid and satisfied, and the State was then and there released and discharged from any and all claims of every name and nature arising thereunder. (R., pps. 51–52, Exhibits "10" and "11.")

The claims of the plaintiff in error in relation to this contract were given no weight by the Connecticut Court, and we submit that there is no error in the reasoning of that Court. (See Opinion of the State Court, Record, p. 72.)

II.

With regard to the second proposition, upon which the plaintiff in error lays great stress, viz.:

That the State Court erred in not holding that said Act and orders referred to deprived the town and taxpayers of Glastonbury of their property without due process of law, and deprived said town and taxpayers of the equal protection of the law, in violation of Sec. 1 of Art. 14 of the Constitution of the United States, we contend that:

The Connecticut Supreme Court gave no weight whatever to the claim that the acts and orders referred to were in violation of Sec. 1 of Art. 14 of the Constitution of the United States. The dissenting opinion is based wholly upon the proposition that the public act in appointing the Commissioners for the Connecticut River Bridge and Highway District in the first instance contravenes the inherent right of a Connecticut town to choose its own ministerial officers.

A question controlled entirely by the fundamental law of Connecticut and the interpretation of that law by the Connecticut Court is, we contend, final.

> See authorities and argument in brief heretofore submitted, pages 21 to 41, inclusive.

The brief of the plaintiff in error contains some sweeping assertions of fact to the effect that the property of the town of Glastonbury is being taken without due process of law, but we fail to find anything in the Record to warrant these assertions.

In part III of his brief the plaintiff in error has reviewed the minority opinion of the Connecticut Court, and has attempted to present to this Court the minority opinion as a better interpretation of the Constitution of Connecticut than is the majority opinion.

We must again insist that the questions, whether the towns of Connecticut created the State or the State created the towns, or whether there exists in Connecticut a dual sovereignty of town and State, are questions for the State Court to decide, and in our argument on this point submitted to the State Court and printed with our brief submitted to this Court in April, 1897, we have cited an unbroken line of decisions by the Connecticut Court, which hold most emphatically, that the town is the creature of the State having no inherent sovereign rights. See brief heretofore submitted to Connecticut Court, and printed with brief submitted to this Court, p. 21.

We submit that the doctrine of the dissenting judges is without precedent and utterly impossible of application, because it recognizes the existence of two absolute sovereigns over one and the same territory in relation to the manner and means of maintaining the public highways of Connecticut.

In the case at bar the district required to maintain the bridge in question is comprised of five towns, and we may assume that they are all opposed to the operation of the Public Acts in question.

If the State may impose the duty of maintaining the bridge in question upon this district, but must leave the performance of that duty to town-appointed agents, and the towns neglect or refuse to appoint such agents, we have then no one to put the law in operation, and, consequently, no one to compel to act, and no one to punish for not acting.

The sanguine counsel for the plaintiff in error may have abundant faith, that the towns would not refuse to obey a public act. It is enough for us to suggest, that should the towns in their alleged sovereignty refuse to act, the State would be impotent, and we trust that if any such state of doubt and conflict is to be imposed upon Connecticut, this Honorable Court will let the Supreme Court of Connecticut take the first step.

III.

DUE PROCESS OF LAW.

Upon this point we call the attention of this Honorable Court to our brief, filed in April, 1897, pp. 23 to 44, inclusive, and our claims there made that the decision of the State Court should stand.

See, also, Pennoyer *vs.* Neff, 95 U. S., 714.
Ex parte Wall, 107 U. S., 265.
Pearson *vs.* Yewdall, 95 U. S., 294.
Arrowsmith *vs.* Harmoning, 118 U. S., 194.
Hilton *vs.* Merritt, 110 U. S., 97.
Campbell *vs.* Holt, 115 U. S., 620.
Missouri Pacific R. Co. *vs.* Humes, 115 U. S., 512.
Fox *vs.* Cincinnati, 104 U. S., 783.
Turner *vs.* New York, 168 U. S., 90.
Hodgson *vs.* Vermont, 168 U. S., 262.
Castillo *vs.* McConnico, 168 U. S., 674, 683.

This question is many times propounded in the plaintiff's brief, but we beg to call the attention of the Court to some of the assertions of fact there made and upon which the plaintiff's argument in this regard is based.

On page 42 of the brief of the plaintiff in error, we find the following:

"We are not denying the taxing power of the State. They have not laid a tax. They have set state officers over the towns to simply demand so much money, etc."

And again, on page 47, we find the following:

"The present law does not impose a tax. It is not the exercise of the taxing power. It simply declares that certain towns shall *lay taxes*."

It is not necessary to again refer the Court to the Act of 1895, to disclose the startling variance between the language and object of that act and the assertions of counsel just quoted.

On this very point on page 38 of the brief for the plaintiff in error, we find the following admission:

"True, there is a special provision in the Special Act of 1895, Record, p. 54, Section 4, that the towns shall provide for the expense *in the tax levy*. But how can the treasurer compel them to do it? If a town meeting be called can the treasurer compel the voters to *lay the tax?*"

And again, on page 39 of their brief, we find the following:

"The Court will notice that the Special Act of 1895 does not impose a tax upon the towns, and provide methods for the collection of it." "*It simply provides that a tax shall be laid.*"

Per contra the Court will notice that the Special Act of 1895 *does* impose a tax upon the towns, not in terms but in effect, and provides methods for collection of it. The exact provision of the statute is this: "And said towns are hereby authorized and directed to provide for such payments in the annual tax levy of said towns." (Record, page 54.) From which it clearly appears that the proportion of expense for this public work assigned to each town by the legislative act is to be collected through the ordinary statutory provisions relating to

town expenses, as provided for in the annual tax levy of said towns, that is, the ordinary machinery already in operation for the collection of taxes to provide for ordinary town expenses, is made use of to provide for the expenditure in question.

But, however that may be, is it not apparent that the counsel for the plaintiff fail to distinguish between the purpose and object of the statute and the machinery provided for its operation?

The sole errand and purpose of the Act of 1895 is to secure the maintenance of a bridge for the use and benefit of the public.

The expense incident to the maintenance of this bridge is put upon a district specially benefited. This district is composed of five towns, and these towns are expressly directed by the statute to raise their several portions of the expense "in the annual tax levy of said towns."

Confessedly, we have here a clear and explicit exercise of the taxing power resting in the sovereign state and to which, it is admitted, all municipalities created by the State are subject.

In commenting upon some of the authorities cited by us in our brief submitted to the Connecticut Court, counsel for the plaintiff in error on page 49 of their brief make this concession:

> "These cases establish one very plain proposition. Burdens may be placed by the legislature upon counties, cities, and towns. Bridges and highways may be assigned to the charge of the people in particular localities. Not one of them sustains the point that local self-government can be taken away in the process of imposing these burdens."

Is not this a clear concession that the ultimate object and the initial purpose of the statute are in harmony with the Constitution and decisions of the Courts?

And does it not seem clear that the objections raised by the plaintiff in error relate wholly to the agency or machinery employed by the Legislature to put the law in motion?

And upon this point is it not manifest that the plaintiff in error entirely loses sight of the fact that we are dealing with a new corporation in which town lines are used simply to give geographical limits to that corporation. We have shown that the very thing done by Connecticut in the Acts of 1895 has been done many times by other States, and in every instance the Courts have held that the manner and methods of accomplishing the purposes of such statutes lie wholly within the discretion of the several legislatures. To hold to the contrary would be to concede a right with no power to exercise that right. See citations in brief heretofore submitted to this Court and the Connecticut Court, pp. 5 to 27 inclusive.

In the case at bar a district is formed and Commissioners are appointed to represent that district, *not the towns comprising it.* Town officers are in no way involved or disturbed.

It is true the Constitution of Connecticut provides that certain town officers shall be elected by ballot, but it must be equally true that the Legislature is free to prescribe the manner in which any and all other public officers or agents shall be chosen.

We have in Connecticut to-day Commissioners without number appointed by the General Assembly to represent local interests of a public nature. For instance, the County Commissioners are appointed by the General Assembly to represent and manage the affairs of the several counties of the State. A county is a district composed of certain towns, created and changed at will by the Legislature.

Section 2674 of the General Statutes of Connecticut (see appendix) gives to such County Commissioners full power to

repair any defect in the highways of the towns comprising the counties, and they may issue a warrant against the selectmen of the towns or bring an action of debt against the towns for the collection of any expense so incurred.

In such cases the right of local self-government guaranteed by the Constitution is in no way curtailed. All the towns are represented in the General Assembly, and to their representatives the people have, in their Constitution, delegated and granted all legislative power, which must include all appointive power where there is no express provision that a public agent named shall be chosen by ballot.

It is no answer to say that some of the Commissioners appointed by the Legislature represent the State, as the Bank, Railroad, Insurance, and Highway Commissioners. The State is composed of towns and the inhabitants of towns, precisely as the bridge district in question is composed of towns and inhabitants of towns.

The point raised against the administrative provisions of the law in question, viz., that no tax is actually laid, seems to be absurd.

The inconsistency of the learned counsel for the plaintiff in error is, we think, made very apparent by this claim.

The law directs the towns to raise the money needed "in the annual tax levy of said towns."

Here, surely, local self-government is in no way infringed, neither is any doubt left as to the duty imposed, but it seems to be claimed that the act should have gone further and laid the tax on the grand lists of the towns.

Is not this a clear admission that the process of the law in question is due and complete, provided the town obeys it.

On page 40 of the brief of the plaintiff in error we find the following sentence: "The voters of the town may refuse to lay the tax or supply the treasurer with a dollar," and again on page 38, "If a town meeting be called, can the treasurer compel the voters to lay the tax?"

Do the counsel here contend that there is not due process of law, because the statute having clearly prescribed a duty does not then proceed to lay and collect an arbitrary tax, ignoring local officers and the vote of the inhabitants? If so, what of their former and oft-repeated claims that the selection of the Commissioners should have been left to the voters of the towns composing the district, and if there is danger that the towns will refuse to lay the tax in obedience to the statute, we again call the attention of this Honorable Court to the probable result of leaving the appointment of the Commissioners to the vote of the towns composing the district.

We submit that the only concrete notion of due process of law which the learned counsel seem to make clear in their argument is, that nothing is due process of law that does not give to the objecting town a clear and definite way to defeat the operation of the statute, in so far as it relates to the appointment of the Commissioners.

And, with regard to the matter of expense, nothing is due process of law that gives to the town authorities any part in laying and collecting the necessary tax.

On page 4 of the plaintiff's brief, the complaint is, that the taxpayers of the district are not consulted in the appointment of Commissioners, and on page 40 the complaint is that, if the laying of the tax be left to the taxpayers they may refuse to act, and the tax should have been laid by the State.

On page 18 of the same brief, in discussing the Act of 1893 which appointed Commissioners to represent the State

in the care and control of the highway in question, the following argument is advanced in defense of this very method:

> "The State in determining whether or not the bridge should be rebuilt must necessarily reach such determination through the judgment of some agents, and what more natural and reasonable mode could the State adopt than to submit the whole question to the jurisdiction, investigation, and determination of the Board of Commissioners specially appointed for the care, maintenance, and control of the bridge in question."

Now we fail to see wherein the inhabitants of the district in question do not have just as much voice in the administration of the law of 1895 as the inhabitants of the State, which is simply a district of larger territory, had in the administration of the law of 1893.

The Commissioners are appointed by the Legislature in both instances, and their duties are the same in both instances.

In the one case the expense is put on all the towns, *i. e.*, the State, and in the other upon the five towns specially benefited.

In both cases the inhabitants as separate individuals are subject to the law of the land as promulgated by their representatives in general assembly convened, and in neither case do they vote directly by ballot for the Commissioners.

Granting the power of the Legislature to create the district in question, and put the burden of the expense upon the towns included in such district, it appears that the same process of law is applied to the inhabitants and taxpayers of the district in question, as was applied to the inhabitants of the State by the Act of 1893, which act the plaintiff highly approves.

The case of Mobile County *vs.* Kimball, 102 U. S., p. 691, turns upon a state of facts almost precisely like those in the present record. See also Hagar *vs.* Reclamation District, 111 U. S., 701.

We have printed largely from this case in our brief heretofore filed, and we again call the attention of this Honorable Court to this case as conclusive upon all the constitutional questions claimed to be raised.

In this supplemental brief we have not attempted to do more than touch briefly upon a few of what seem to us to be illogical, if not unwarranted, claims contained in the brief for the plaintiff in error, filed in April, 1897.

We wish to call the attention of the Court to a statement on page 2 of the Brief of the Plaintiff in Error, filed April, 1897:

> "Prior to 1887, the State of Connecticut had the care, maintenance, and control of the bridge and causeway described in the complaint."

And on page 56 of the same brief, the same statement is reiterated in this language:

> "In 1887, the Legislature passed an Act making the highway in question a free public highway. Before that time the State had always been charged with the maintenance of this highway, and had maintained it either by itself or through its own agents."

There is no authority whatever in the record for stating that the State of Connecticut maintained said bridge and causeway previous to 1887; and as a matter of fact, the State of Connecticut never maintained said bridge and causeway for one single moment previous to 1887, nor since that time, except for about two years when the statute of 1893 was in force, which statute is quoted on page 9 of the Plaintiff's Brief and on page 7 of our brief, filed April, 1897.

The bridge and causeway in question were constructed and owned by The Hartford Bridge Company, a private corporation chartered by the Legislature of Connecticut as a toll bridge company, and the ferries in the vicinity were discontinued by legislative act in order to give The Hartford Bridge Company the benefit of the travel. These facts appear in the report of East Hartford *vs.* Hartford Bridge Company, 10 Howard, 512, already quoted to another point.

Also in case of Hartford Bridge Company *vs.* Union Ferry Company, 29 Conn., 210.

The Hartford Bridge Company always maintained the bridge and causeway until its property was condemned under the Act of 1887, "Exhibit X," Record, page 60.

It has always been the established policy in Connecticut to place the burden of maintaining highways and bridges on towns. The plaintiff in error correctly states the fact so to be on page 4 of his brief, where in speaking of the Act of May 24, 1895, Exhibit 8, he says:

> "Up to this time the General Assembly had never before attempted to take care of or maintain any of the highways in the State by its own appointed agent. It had often imposed duties upon towns relative to highways, some of them of an extraordinary nature, but had uniformly left the town to discharge those duties by their own chosen officers. Such was the course pursued by the law of May 19, 1897."

We believe that the opinions of this Honorable Court, cited in our brief heretofore filed, upon all the points in issue, and the learned and logical opinion of the Supreme Court of Connecticut in sustaining our position upon every point raised in the record, clearly warrant the affirmation of the judgment of the Connecticut Court.

Respectfully submitted,

LEWIS SPERRY,
GEO. P. McLEAN,
AUSTIN BRAINARD,
Counsel for the Defendant in Error.

April, 1898.

APPENDIX.

General Statutes of Connecticut, Section 2674:

"Whenever any town shall neglect to keep any public road within such town in good and sufficient repair, or whenever the selectmen of any town shall fail to remove or cause to be removed any encroachments upon any highway in such town, the county commissioners of the county in which such road or highway is, or a majority of them, upon the written complaint of any six or more citizens of this State, under oath and endorsed and approved by the State's attorney in said county, after proper inquiry made by him, shall appoint a time and place when and where all persons interested may appear and be heard upon the propriety of such repairs, or of the removal of such encroachments, and shall give notice thereof to the first selectman of said town and to the person or persons maintaining such encroachments, by causing a true and attested copy of said complaint, accompanied with a summons notifying the said parties of said time and place, to be left with each of said parties, or at their usual place of abode by some proper officer, at least six days inclusive before the day appointed for the hearing; but before issuing any summons on said complaint said commissioners shall require of the complainants a sufficient bond for costs to the adverse parties, and may at any time thereafter require further bond or bonds for such costs. If the commissioners shall find that such road or highway ought to be repaired, or that such encroachments ought to be removed, they shall order the selectmen of such town to cause said road or highway to be repaired and said encroachments to be removed, and shall prescribe the manner and the extent of such repairs, and of the removal of such encroachments, and the time within which the work shall be done, and may for reasonable cause extend such time.

"If said orders be not complied with, the commissioners shall cause such repairs to be made and such encroachments to be removed at the expense of the county, and upon the completion of the same may grant or issue a warrant in favor of the county, against the selectmen of such town to collect the amount of money so expended, with the additional fees and costs of the commissioners, or may bring suit against such town in the name of the county treasurer, to collect such amount, with said additional fees and costs of the commissioners."